



Association of **Lawyers for Children**

Promoting justice for children and young people

**RESPONSE OF THE
ASSOCIATION OF LAWYERS FOR CHILDREN
TO THE FAMILY AND FAMILY MEDIATION SCHEME**

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16 April 2007

A. INTRODUCTION

1. The ALC is a national association of lawyers working primarily in the area of public child care law. It has over 1200 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, or local authorities.
2. This consultation response in respect of the revised proposals for the Family Fee Schemes should be read in conjunction with the Association's response to the initial reform programme set out in "Legal Aid Reform: The Way Ahead". We endorse our previous detailed response and in particular we do not accept the premise that a fixed fee regime is appropriate to public law children's cases.
3. The proposals, as they currently stand, represent a missed opportunity to address the fragility of the supplier base and the urgent need to attract young lawyers to this area of work. The rates are based on remuneration rates which have remained broadly the same for over a decade, with no inflationary increment. The rates proposed in fact represent significant cuts that neither the government nor society tolerates for public sector employees. Whilst we welcome the fact that funds may become available at some point, the anticipated delay of three to four years will be too late.

B. SCOPE AND CONTEXT OF THE RESPONSE

4. This response focuses on the public law proposals, but also comments on the private law and mediation proposals insofar as they relate to children.
5. The ALC recognises that the LSC has made significant alterations to the fixed fee scheme, which ameliorate the greatest financial risks to solicitors that the previous scheme created; particularly in the removal of advocacy from the present scheme and the lowering of the level at which hourly rates apply.
6. We are however, severely hampered in putting forward a fully considered and complete response to the proposals by:-
 - the obscure data sets and assumptions by which decisions concerning the revised scheme have been justified;
 - the decision to consult separately and later on payments for advocacy which will impact on these proposals ;
 - the decision to consult on alterations to the funding codes at a separate and later date;
 - the decision to press ahead with consultation in respect of the revised scheme in advance of publication of the House of Commons Constitutional Affairs select committee report.
7. We have responded to the Chief Medical Officer's consultation and will engage in further cross-departmental discussions in relation to payments for experts and residential assessments. We merely highlight here that children's needs risk being lost in the debate. The transfer of payments for experts and residential assessments to other departments would free up resources which should now be 'ring fenced' for improvements in rates for family work.

8. In being asked to respond at this stage to the revised scheme, we are placed in a situation where the overall position under the revised proposals cannot be evaluated.

C. GENERAL COMMENTS

9. The present consultation highlights that fixed (not graduated as described) fees are inappropriate for care proceedings. As a result the revised scheme inevitably leads to illogical results. For example it is not uncommon for parties to be represented through part of a case and in fact the use of hourly rates would provide protection to the fund and pay solicitors for the work they do.

10. The proposals for fixed fees and payment of half fixed fees are illogical and unfair as is the consultation process that has accompanied it. We have been struck, in the consultation process since last July by the contradiction in approaches by the DCA / the judiciary and the LSC towards child care practitioners. On the one hand we have found an open and very welcome recognition of our worth from the judiciary. The DCA seek our assistance as a representative body to assist with changes and improvements in the system and both intend to rely on panel members' competence and expertise in improving the system. The focus of work for children and families in the child protection judicial system is for greater children's participation and early work of high quality to make good early protective decisions for children to a) divert cases away from the court arena if possible and b) to clarify issues early so that cases within the court system are dealt with as well as they can be.

11. The LSC's attitude has unfortunately been very different and we deplore the trends revealed in consultation and the latest proposals. There is little respect for our professionalism; there is more than a suggestion that solicitors need not do the work they are qualified to do, and a suggestion that we may misuse public funds e.g. that solicitors may deliberately take cases and pass them on to achieve the full fixed fee.

12. The decision not to fully reward panel membership is highly regrettable and will not support the work being done alongside the proposals to implement the recommendations of the Public Law Review. It is illogical to have a system where panel membership (which was introduced to raise and maintain standards and continuity of representation for children; not simply to encourage people into the area of work) is only rewarded where a case becomes longer or more expensive. It is the very expertise of the panel solicitor which the revised Judicial Case Management Protocol and Pre – Proceedings Protocol hopes to exploit to clarify issues early, shorten cases, and thereby provide earlier resolution of issues for children, the result of which will be to reduce costs and achieve better outcomes. Lack of experience in social workers, children’s guardians and solicitors can cause whole system delays and greater cost. Peer review, which can be undertaken by colleagues who do not necessarily conduct children work, will not ensure the quality that the panel does.

13. We commented in 2004 in response to a consultation on the TFF scheme for Civil Controlled work as follows:-

“.....the Legal Help Scheme is a clumsy, inefficient and inappropriate way to deal with the issue of Child Protection Conferences and Case Conferences at the pre-issue stage. A more appropriate method would be for non-means, non-merits certificated work to be available at this early stage recognising that this is likely to lead to a more efficient use of limited funds and to the fair and proper representation of the parties in the overall Child Protection Process. It must be right that parents can and should receive appropriate advice to help them understand the issues at the very earliest stage of an investigation and potential interference with their right to family life. Such help and professional assistance at an early stage is likely to lead to more appropriate and indeed proportionate steps for the protection of the children concerned.”

We welcome the Commission's decision to make provision for representation of parents pre-proceedings stage, however we do have concerns as to whether this is misdirected, particularly as the pre-proceeding consultation is still on-going and the final guidance is awaited. We also seriously doubt that linking the provision of this additional advice to a Local Authority decision to issue proceedings will actually allow any significant intervention by a solicitor for the parents early enough to negotiate alternatives to proceedings. Few Local Authorities take their decision to issue public law proceedings lightly, therefore making the trigger to this advice Notice of Intention to Issue seems to us too late. The very limited fixed fee at level 1 is insufficient to allow full involvement on behalf of parents in child protection procedures and children protection conferences where representation of parents could actually make a difference to the outcome for the children involved. Therefore whilst we welcome the Legal Services' recommendations to improve pre-proceedings work, we believe that this area of the proposals does require further thought once the full guidance is available. We are concerned that by linking this work to a Notice of Intention to Issue the Legal Services Commission may not reach its stated aim of a reduction in the number of cases heard or a narrowing of issues thereby reducing cost. Any monitoring of this service based on the current proposal will not be a true reflection of the benefits that early intervention and support could actually have. A much better trigger for advice would be the instigation of child protection conference procedures. We believe that diverting advice to this stage would be more likely to meet the Commission's stated aims.

14. One of the key requirements of the Children Panel is continuity of representation. Is it suggested that panel members should only conduct work after the escape and hourly rates are reached? Bearing in mind the drive to reduce costs through competition this would appear to be the case. If best value tendering and increased competition will lead to early work for children being conducted by paralegals or solicitors without experience, it is short-sighted, will not reduce costs or delay and

will put children's lives at risk. Regrettably it is not currently planned that a child is represented by a solicitor or have the benefit of the appointment of a children's guardian pre-proceedings; when crucial decisions will be made. In those circumstances it is all the more essential that experienced panel members, who are alive to ensuring that the child's voice is not lost, act for parents.

15. We deplore the continuing ignorance of the nature of our work e.g. there is a persisting view that cases may be negotiated to settlement early at Case Management Conference. We believe that the proposal to exclude preparation for advocacy is based on a lack of ability to determine from the data what preparation is done for advocacy and an incorrect assumption that because a solicitor has the conduct of a case they will not have to prepare for a substantive hearing.
16. We have been reassured during negotiation that solicitors will benefit from the swings and roundabouts in a fixed fee regime. Our understanding of this was that although we would lose on some cases we would gain from others. We deplore the move to ensure that wherever solicitors could gain in cases, efforts are being made to stop them receiving the full fee e.g. the proposal for half a fixed fee when we do not act throughout a case coupled with the consultation on amendments to the funding code.
17. We deplore the continuing administrative burden to solicitors Whilst the LSC hopes the scheme will 'contribute to achieving ...administrative savings' we see little benefit to solicitors in reduced bureaucracy or interference in day to day practice. There does not appear to be one area in which there will be a reduction in administration. Indeed, despite the fact that County and High court cases go through a demanding taxation process, for the last few months the LSC have re-introduced case plans for higher cost cases causing significant further bureaucracy and delay in dealing with cases for practitioners, and additional burden to the LSC staff.

18. We note that there is no proposal for additional payment or bolt-ons for related proceedings within the same case and that these should instead be dealt with by means of the exceptional case threshold. We do not accept that these cases will necessarily result in becoming exceptional, particularly on applications for placement orders to be heard alongside existing Care Order applications. There are distinctly different legal issues to be considered on the making of a Placement Order particularly in relation to contact and the consequences of the Order are serious for parents and children involved. It does cause us concern that the Commission's proposals effectively bring this additional work within the standard fixed fee without reflecting the additional work involved when such applications are made. Similarly with regard to a Local Authority application for leave to terminate contact, this is unlikely to result in a case becoming exceptional, again serious issues are raised for the children and parents concerned.
19. We deplore the unwarranted proposals to intervene in solicitors professional judgement e.g. "we will monitor conflict of interest more closely to encourage separate representation only where a conflict is probable" (2.35)
20. We deplore the unwarranted proposals to interfere in the court's control of cases e.g. the decision as to who becomes a party in proceedings.
21. As we have sought repeatedly to point out, the loss to the already fragile solicitor base has started and sufficient care to prevent further loss has not been taken. Indeed the consultation process, coupled with the LSC approach to the unified contract have caused a significant further deterioration in relationships between solicitors and the LSC. Our members are looking at their options and we anticipate the continuation of the leeching of expertise that is occurring at present.

22. By reason of the piecemeal consultation process, with separate areas of reform being the subject of consultations disparate in time, we are unable to advise our members how the final scheme will appear nor have input into the scheme proposed as a whole. We can only refer them to the fact that the LSC looks to achieve considerable savings; and that despite the savings that the Commission is seeking to achieve from other parts of the fund there is no prospect of their expertise and hard work being rewarded.

23. The LSC expects a Rolls Royce service at the cost of an Ambassador. The decisions made and resultant proposals represent a significant risk that children's interests and safety will not be properly represented in the care system. This is likely to lead to erroneous and dangerous decisions being made for children and unfair decisions for parents. Will such a process be made transparent to the press and public?

D. RESPONSES TO QUESTIONS

FAMILY FEES SCHEME

QUESTION 4 (PAGE 9)

Do you consider the supra regional groupings at Level 3 appropriate?

The ALC notes that the ultimate aim, as set out on page 8, paragraph 2.13, is to set rates regionally through competitive price tendering. What is being put forward now is simply a transitional scheme. That being so, we see no purpose at this time in moving away from a national scheme with appropriate London weighting.

The ALC strongly disapproves of the current proposals. They are divisive, and do not reflect the fact that the work itself, and the presenting problems of the families we represent, are the same everywhere. The cost to practitioners of providing the service is comparable countrywide (with the exception, perhaps, of London). How can it be right to pay a solicitor in Leeds, acting for a parent, £1,880, more than a third less than his counterpart in Bristol will receive?

As a national organisation with members practising in all regions, we remain concerned that the huge disparity in fee levels, will leave many of our members in considerable difficulties in fully and effectively running a case at the rates proposed. The Legal Services Commission's stated aim of creating these figures based on a mathematical analysis of actual costs claims and a wish to increase competition does not make any allowance for the need to ensure quality provision of legal services to children and young people.

QUESTION 5 (PAGE 9)

Do you agree with the proposal to only pay half the Level 3 fee where the client is not involved throughout the case?

5.1 We do not agree with this proposal as it does not reflect the reality of work undertaken. To receive only half the fee in circumstances where either a client failed to provide instructions or has become involved in the case at a later stage does not reflect that the solicitor may well have undertaken considerable work prior to the client ceasing

to instruct, or will still need to undertake considerable work even when the client has joined the proceedings later. This is seen as particularly inappropriate where a solicitor may have been involved in the beginning with a client and has undergone with them a certain amount of assessment, preparation of evidence and then careful consideration of the client's position leads to a decision not to continue involvement.

5.2 Most parties who miss the first hearing and consult a solicitor are joined comparatively early in the proceedings. These might be, for example:

- A father who has been served with notice of proceedings, and consults solicitors after the first hearing, having gone to court and being advised to do so;
- A young mother who has not gone to the first hearing at all, having misunderstood the need to do so;
- A person with learning difficulties who has missed the first hearing because they thought that only their mother, with whom their child is accommodated, needed to attend;
- A father who did not know there were proceedings until the court directed the local authority to find and serve him;
- A mother who is still in hospital after post-birth complications (either to herself or her child) and has not yet instructed a solicitor.

5.3 Further, these proposals do not take into account many other different reasons why parties are joined after proceedings get under way, but play a major role, e.g.

- A family member who may be a perpetrator of injuries or abuse, and is given leave to intervene;
- A grandmother who has had care of the child since before the start of proceedings, and who is now told that the local authority will not support placement with her, and she must apply for an order in the proceedings.

5.4 A party joining proceedings later on will generally be doing so because they have a specific case to put and therefore substantial preparation would be needed on their

behalf. Proper representation can make the difference between a child growing up in their extended family and going into permanent local Authority care.

5.5 It is not clear whether if that was the case the exceptional case escape would apply from twice the full fixed fee or from twice half the fixed fee. On the assumption that it is intended that the escape point remain 2x the standard fee, what would be the commercial sense in agreeing to act for such a person? They would effectively be left without representation, since it would not make business sense to take on such a client.

5.6 Obviously if a client is discharged as a party after five or six weeks, e.g. because a paternity test shows they are not the father, then the amount of work which will have been done will have been very much less than the standard fee. However, such cases will be very much less common than cases where the party concerned drops out at a very late stage of the proceedings. This will be particularly so if the proposals on which the LSC are currently consulting, at paragraph 5.4 of “the Funding Criteria for Child Care Proceedings” come into effect. We take the view that this particular proposal is so ill conceived that it will lead to a substantial percentage of solicitors ceasing to do this work.

5.7 It is a matter of great concern to the ALC that one of the basic concepts underpinning fixed fees (namely that, over time, swings and roundabouts will balance out to produce a reasonable average case fee) is being eroded by proposals to reduce standard fees by reference either to the length of time a party is involved in a case, or (as currently being consulted on) by altering the principle of non-means, non-merits tested funding. Are these proposals being put forward on the basis of analysed data? If so, may we please see it? What effect will implementing such changes have on the average case fee?

5.8 We have considered the differential in fees for parents and children and on balance consider that the fixed fee should be the same for both. The only proviso we have is that

the revised Judicial Case Management protocol may provide a far greater burden of case management on the child's solicitor, which should be properly rewarded.

QUESTION 6 (PAGE 12)

Do you agree with the approach of having a single stage at Level 3?

6.1 In principle, it simplifies the scheme. However, if the price for such simplification is the introduction of half-fees (as referred to at question 5) or alterations to the funding code as proposed in paragraph 5.4 of the Consultation paper, we doubt whether solicitors would find the scheme commercially viable. The ALC welcomes the move away from a system based on stages of the Judicial Case Management Protocol.

QUESTION 7 (PAGE 13)

Do you agree with revised proposals around acting for more than one child on the same case?

7.1 Broadly, we agree. The previous proposal (1 fee per child) was clearly inappropriate. We invite consideration of payment of paying a further half fee when acting for a third child.

7.2 The ALC doubts the conclusion, set out at para 2.33 that "historical data shows that costs are, on average, higher when acting for children". This is because it appears to us that, in analysing the costs data to produce this conclusion, advocacy costs (where panel solicitors will generally have done their own advocacy in accordance with their undertaking to the Law Society) have not been "stripped out" (or, alternatively, counsel's fees in parents' cases have not been added in). That step would be necessary in order to produce a meaningful comparison.

7.3 What regime will apply when it becomes necessary for another solicitor to represent, e.g. a teenage child in a sibling group of 4? On the present proposals, it appears that the first solicitor would only receive 1.125 x the standard fee, despite continuing to represent three children! This cannot be right, and needs to be specifically addressed.

7.4 What happens when a baby is born towards the end of proceedings involving another child/children, but the baby's care proceedings are not consolidated with those of the older siblings, and follow a different timetable? Will there be a separate certificate for the baby and therefore a separate fee?

QUESTION 8 (PAGE 13)

Do you agree with revised proposals around acting for more than one parent on the same case?

8.1 Broadly, we agree the revised proposal seems more realistic particularly when taken in conjunction with the revised exceptional case threshold. We are concerned however that where a conflict does genuinely arise in a case the current proposals may present a disincentive for solicitors to take on such cases or indeed to encourage a client to seek separate representation because of the consequent effect in the standard fee paid. We are concerned that operation of the scheme could result in an administrative interference in proper professional decisions over whether or not a conflict arises in any given case.

QUESTION 9 (PAGE 14)

9.1 Do you agree with the definition of advocacy? If not, what amendments would you suggest. We do not agree that preparation for hearings should be excluded. If the LSC intends to set new advocacy rates "that cover both solicitors and counsel which will involve a reworking of the Family Graduated Fee scheme for barristers from April 2008" then there needs to be a level playing field.

9.2 The LSC now has a great deal more information than in July 2006 about the extent of advocacy conducted by solicitors in care proceedings. The preparation for a contested hearing can entail considerable work; preparation of the bundle, reading of the bundle to prepare cross-examination; cross referencing; preparation of position statements and /or skeleton arguments and preparation on points of law and case law. It is separate process to that of day to day running of a case and the work is not necessarily conducted by the person running the case.

9.3 We anticipate further meetings to reduce issues under the revised judicial case management protocol. Advocates' meetings are meant to be attended by the advocate conducting the case so that constructive work is done outside court. They should be considered in the 'advocacy package'.

QUESTION 10 (PAGE 16)

Do you agree with the proposed approach to payment where a client changes solicitor?

10.1 No. Where a conflict arises or a client seeks alternative legal advice it is not appropriate to automatically assume that the two solicitors involved should then receive only 50% of the Level 3 fee.

10.2 The approach is different, depending on whether the change is a change involving conflict, or for some other reason. That other reason may be for a variety of causes, e.g.

- The client went to a solicitor who is not on the Children panel and has come to regret that decision;
- The solicitor can no longer act, having regard to the client's instructions, bearing in mind the solicitor's duty to the court and professional conduct obligations.
- The client finds the advice given unpalatable
- The client has mental health or other difficulties and finds it hard to get on with her first solicitor

10.3 In such cases the new solicitor will only receive a half fee. Who would think it commercially sound to take on a client in such circumstances? The client in the first scenario will at least have a choice: stay with the same solicitor or act in person. The client in the second scenario will have no choice at all – s/he will have to act in person. This proposal seems complex and difficult to work in practise and unreasonable.

10.4 It is not uncommon for one of two clients to remain represented by the first solicitor following identification of a conflict. However there will be cases where the nature of the conflict is so profound that it is inappropriate for a solicitor to continue to

act, and others, where the consent of the client for the solicitor to continue to act is not forthcoming, which forces both parents to instruct new solicitors.

It appears that this part of the scheme is proposed to avoid the “risk that a few suppliers may encourage clients to transfer to other providers in order to maximise the fee”. If such a risk is real, such a proposal to combat it is a disproportionate ‘punishment’ to the many.

10.5 What provision is there for a transferred case to become “exceptional”? If it escapes fixed fees at a certain point, will that be at 2x the standard fee, or 2x the ½ standard fee proposed in these cases? If, as seems intended, it will be 2x the standard fee, this will again make little commercial sense and it is unlikely that such clients will find an experienced solicitor willing to take on their case.

PRIVATE LAW SCHEMES

QUESTION 11

Do you agree with this approach to calculating whether a case is exceptional?

11.1 We remain concerned that all interlocutory advocacy in private law proceedings remains within the fixed fee and it is only advocacy for final hearing (once an appropriate amendment to a legal aid certificate has been sought) that is outside it. It fails to reflect the significance of the involvement of the solicitor or barrister at court in the early stages of the case and we believe may cause a disincentive to using experienced solicitor or counsel for this work. This is particularly significant in cases where children are separately represented under Rule 9.5 and although we would anticipate that many of these will meet the threshold for escape, that level is of course higher in private law proceedings and therefore the disincentive to involve experienced solicitors or counsel at an early stage may be counter-productive.

We regret the decision to do away with the 15% uplift for specialist panel membership which will reduce the quality of provision available under the public funding scheme.

12. Do you consider the SUPRA regional groupings at Level 3 appropriate?

13. Do you consider the London uplift at Levels 2 and 3 appropriate?

See our response in relation to the public law scheme above.

The fee levels in respect of private law are exceptionally low and as such will further discourage any of our members providing the service, as intended.

15. Do you agree with the scope of children cases at Level 2?

15.1 We support the use of mediation as a means of resolving disputes between parents and family over arrangements for children, we do question the Commission's suggestion that solicitors should not attend initial conciliation appointments. We believe the thinking behind this is misguided. Different courts operate the initial conciliation process differently and our members' experience is that legal advice available to the client alongside the mediation offered by CAFCASS and any encouragement offered by the Judge involved is an important factor in achieving settlement of cases at this stage. It is equally important that if a case is not resolved the lawyer is available to deal with any directions issues raised by the court to ensure the effective progress of the case without delay. We refer the LSC to the Principal Registry scheme launched in December 2006 for assistance on this point.

15.2 The increasing move towards direct involvement of children and young people themselves within the conciliation process, is not mentioned in these proposals. Our members often provide direct advice to competent children and/or guidance to parents doing through difficult separations. Seeking to minimise our role within private law proceedings, and increasing the numbers of those left to represent themselves will result in further delay, distress and emotional and legal costs for all involved.

16. Do you agree with the concept of a higher fee where settlement is achieved at Level 2 in children cases?

16.1 We have concerns about limiting representation at court during conciliation appointments. We also do not believe that seeking to incentivise the costs involved in

settlement is appropriate in a children context. We fail to see how incentivising the solicitors fees in this way will encourage appropriate settlements for children and young people within private law proceedings and we do not support the concept of a higher fee where settlement is achieved. Such a fee also fails to take into account that the ability to settle a case or otherwise is not simply down to the particular solicitor and client but is significantly affected by the attitude of the other party also involved in the case. We are also concerned that where a case involves both children and financial issues the proposals provide that that case would only become an exceptional case where the costs reach three times the combined fees for both areas. It does not necessarily follow that a case which has complex financial issues will involve complex children issues or vice versa. It would seem to us more appropriate to the individual needs of each case if the exceptional case threshold applied to the fixed fee figures for each type of case rather than being combined. By combining them, the risk to practitioners must be greater.

It also seems to us somewhat burdensome for the LSC to introduce what would effectively be a third stage of mediation or conciliation before a case can proceed to Level 3. Clearly a party reaching this stage in proceedings would have already attempted mediation prior to issue of proceedings, would have gone through the court conciliation process and is now being asked to again attend mediation. It would seem to us that if court conciliation has been unsuccessful it would be unnecessary for a further stage of mediation to be introduced. Clearly if the court conciliation appointment highlighted some areas for discussion or potential agreement it would be normal for the court to adjourn the matter to allow further mediation to take place in any event and we therefore do not see the need for the Commission to introduce this further step.

19. Would there be any justification for splitting Level 3 children fee?

We agree that the existing arrangements for seeking public funding to continue to final hearing should remain and that public funding should only be justified for final hearing where there is a case to be put but we do not believe that any further splitting of the Level 3 fee for children cases would be appropriate.

QUESTION 24 (page 28)

Do you agree with the proposals for payments on account?

The proposals appear to be broadly sound, though we would appreciate a clearer and fuller guide. We are disappointed that these proposals make no reference to reducing the ongoing administrative burden faced by solicitors in publicly funded cases. There seems little incentive to moving to fixed fee schemes when they do nothing to reduce the huge volume of forms and paperwork that each publicly funded case generates. There are no proposals to simplify the ludicrous billing system, which has developed historically into the complex and costly procedure we have today. The routine of amendment applications, devolved powers records, application forms, etc, etc will remain the same. These burdens need to be taken into account when considering cost neutrality.

FAMILY MEDIATION

We make no comment on the proposals but highlight a welcome trend to ensure that children's voices are taken into account in resolving disputes involving them.